Supreme Court, U. S.
FILED
JAN 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-992

FLOYD T. FULLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELIOT A. LANDAU
6944 Sun Drop Avenue
Woodridge, Illinois 60515

WILLIAM R. JACOBS, II
7 S. Dearborn Street
Chicago, Illinois 60603

Counsel for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 10

REASONS FOR GRANTING THE WRIT:

1.

The Decision Below Conflicts With The Decisions Of Other Courts Of Appeal As To When Misjoinder Of Offenses Denies A Defendant's Right To Due Process And Violates Federal Rules Of Criminal Procedure 8(a) And 14 18

2.

The Decision Below Conflicts With The Decisions Of Other Courts Of Appeal As To The Preservation And Production Of Evidentiary Material 29

(a) Before the Grand Jury and at trial in violation of Defendant's right to due process and 18 U.S.C. §2071 29

(b) At and before the trial in violation of 18 U.S.C. §3500 and Federal Rules of Criminal Procedure 16, and this Court's decision in Brady v. Maryland, 373 U.S. 83 (1963) 29

3.

The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeal As To

The Cumulative Effect Of Numerous Trial Errors And Judicial Bias In Denying Defendant's Right To Due Process 34

CONCLUSION 36

APPENDICES:

A—Opinion and Judgment of Court of Appeals 1a

B—Order of Court of Appeals Denying Rehearing .. 14a

CITATIONS

CASES:

Alderman v. United States, 394 U.S. 164 (1969) 33

Brady v. Maryland, 373 U.S. 83 (1963) 29, 31, 33

Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964) .. 20

Dennis v. United States, 384 U.S. 855 (1966) 33

Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964) 22, 24, 27

Hyser v. Reed, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963), cert. denied sub nom. Thompson v. U.S. Bd. of Parole, 375 U.S. 957 29

Ingram v. United States, 272 F.2d 567 (4th Cir. 1959) .. 20

Johnson v. Superior Court, 124 Cal. Rptr. 32, 539 P.2d 792 (1975) 32

Kotteakos v. United States, 328 U.S. 750 (1946) 21, 24

McElroy v. United States, 164 U.S. 76 (1896) 20

Ogden v. United States, 323 F.2d 818 (9th Cir. 1963), cert. denied, 376 U.S. 973 (1964) 30

Palermo v. United States, 360 U.S. 343 (1959) 31

Papworth v. United States, 256 F.2d 125 (5th Cir. 1958), cert. denied, 358 U.S. 854 30

Rakes v. United States, 169 F.2d 739 (4th Cir. 1948), cert. denied, 335 U.S. 826 20

Robinson v. United States, 148 U.S. App. D.C. 58, 70, 459 F.2d 847, 859 (1972) 27

Schaffer v. United States, 362 U.S. 511 (1960) 24

United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974), cert. denied, 421 U.S. 964, reh. denied, 422 U.S. 1049 (1975) 18

United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) .. 32

United States v. Battaglia, 410 F.2d 279 (7th Cir. 1969), cert. denied, 396 U.S. 848 30

United States v. Braasch, 505 F.2d 139 (7th Cir. 1974) 18, 28

United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (1971) 31

United States v. Carter, 475 F.2d 349 (D.C. Cir. 1973) 20, 24

United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961) 30

United States v. Cleveland, 507 F.2d 731 (7th Cir. 1974) 30

United States v. Daneals, 370 F.Supp. 1289 (W.D. N.Y. 1974) 32

United States v. DeLeon, 498 F.2d 1327 (7th Cir. 1974) 30

United States v. DiGrazia. 213 F.Supp. 233 (N.D. Ill. 1963) 32

United States v. Fallen, 498 F.2d 172 (8th Cir. 1974) .. 29

United States v. Fioravanti, 412 F.2d 407 (3d Cir. 1969), cert. denied, 396 U.S. 837 30

United States v. Gallo, 394 F.Supp. 310 (D. Conn. 1975) 32

United States v. Harding, 525 F.2d 84 (7th Cir. 1975) .. 28

United States v. Harris, 542 F.2d 1094 (9th Cir. 1976), pet'n for cert. filed, Dec. 14, 1976 ..... 29, 30, 31

United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975) 30, 31

United States v. Isaacs ("Kerner Case"), 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976, reh. denied, 418 U.S. 955 18

United States v. Jackson, 429 F.2d 1368 (7th Cir. 1970) 28

United States v. Johnson, 525 F.2d 999 (2d Cir. 1975), cert. denied, 96 S.Ct. 1127 (1976) 29

United States v. Krilich, 470 F.2d 341 (7th Cir.1972), cert. denied, 411 U.S. 938 (1973) 30, 35
United States v. Lewis, 511 F.2d 798 (D.C. Cir. 975) .. 29
United States v. Lotsch, 102 F.2d 35 (2d Cir. 1939), cert. denied, 307 U.S. 622 24
United States v. Mardian, ... U.S. App. D.C. ....., ... F.2d ..... (No. 75-1383, Oct. 12, 1976) 25
United States v. Marionneaux, 514 F.2d 1244 (5h Cir. 1975) 20
United States v. Pacente, 490 F.2d 661 (7th Cir.1973), rev'd on reh. en banc, 503 F.2d 243 (7th Cir.1974), cert. denied, 419 U.S. 1048 ..... 18, 22, 25
United States v. Poole, 379 F.2d 645 (7th Cir. 1967) 32
United States v. Quinn, 365 F.2d 256 (7th Cir. 1966) 19, 23, 24
United States v. Richards, 430 F.2d 1240 (7h Cir. 1970) 28
United States v. Thomas, 320 F.Supp. 527 (D.D.C. 1970) 32
United States v. Varelli, 407 F.2d 735 (7th Cir. 1969) 21, 24, 35
United States v. Wentzel, 311 F.2d 164 (4th Cir. 962) .. 31
United States v. Wilcox, 507 F.2d 364 (4th Cir.1974), cert. denied, 420 U.S. 979 (1975) 30
Walsh v. United States, 371 F.2d 436 (1st Cir. 1967) 30

STATUTORY MATERIAL:

United States Constitution:

Amend. 5 3
Due Process clause 3, 18

United States Code, Title 18:

18 U.S.C. § 1623 (perjury) 3, 10
18 U.S.C. § 1951 (racketeering-extortion) 3, 10, 28
18 U.S.C. § 2071 (destruction of records) .. 4, 11, 29, 31
18 U.S.C. § 3500 ("Jencks Act") 4, 8, 11, 16, 29, 31

United States Code, Title 26:

26 U.S.C. § 7206 (false income tax return) 6, 10

Federal Rules of Criminal Procedure:

Rule 8 ..... 2, 6, 16, 18, 19, 20, 21
Rule 14 ..... 2, 6, 16, 18, 19, 22
Rule 16 ..... 7, 29

Federal Rules of Evidence:

Rule 404 and Advisory Committee Note 27

MISCELLANEOUS:

ABA Standards, Joinder And Severance (1968) 22
Note, *Joinder of Substantive Offenses and Perjury in One Indictment,* 66 J. CRIM. L. & CRIMINOLOGY 44 (1975) 26
Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure,* 74 YALE L.J. 553 (1965) 27
Note, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264 (1966) 27
1 L. Orfield, Criminal Procedure Under The Federal Rules (1966, Supp. 1975) 20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

FLOYD T. FULLE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Floyd T Fulle respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding on October 4, 1976.

OPINION BELOW

The opinion of the Court of Appeals which is not to be reported, appears in the Appendix hereto. No written opinion was rendered by the United States District Court for the Northern District of Illinois.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 4, 1976. A timely petition for rehearing and rehearing *en banc* and a supplement thereto were all denied on November 19, 1976, and this petition for certiorari was filed within 60 days of that date, an extension having been granted on December 9, 1976, by Associate Justice Stevens. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether it was improper under Federal Rules of Criminal Procedure 8(a) and 14 and a violation of Due Process to refuse petitioner's motion for severance of multiple unrelated charges.

2. Whether petitioner was denied Due Process and Statutory rights by the (a) presentation to the Grand Jury of artificially prepared statements whose source materials had been destroyed; and (b) refusal to promptly transmit some evidentiary material and inability to hand over the destroyed material before and at trial.

3. Whether the cumulative effects of numerous trial errors and judicial bias denied petitioner's rights to a fair trial notwithstanding the "harmless error rule".

STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

". . . nor shall any person be deprived of life, liberty, or property without due process of law."

United States Code, Title 18:

Section 1623. *False Declarations before grand jury or court*

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1951. *Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—• • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Section 2071. *Concealment, removal, or mutilation generally*

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

Section 3500. *Demands for production of statements and reports of witnesses*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the

witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraphs (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

United States Code, Title 26:

Section 7206. *Fraud and false statements*

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; • • • shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

Rule 8. *Joinder of Offenses and of Defendants*

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14. *Relief from Prejudicial Joinder*

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants

in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 16. *Discovery and Inspection*

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and

so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.
(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.
(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the government as evidence in chief at the trial, or were obtained from or belong to the defendant. • • •

• • • • •

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of this case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. Section 3500.

• • • • •

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the

court of the existence of the additional evidence or material.

(d) Regulation of Discovery.
(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.
(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

STATEMENT OF THE CASE

Respondent procured an indictment against Petitioner charging that he abused on various occasions his power as a County Commissioner of Cook County, Illinois, to extort sums of money from various land developers (in violation of 18 U.S.C. Section 1951) in return for favorable action on rezoning applications. It was further charged that Petitioner falsely denied the alleged extortions before the Grand Jury (in violation of 18 U.S.C. Section 1623), swore falsely to two income tax returns (in violation of 26 U.S.C. Section 7206) by failing to include the proceeds of the alleged extortions, and also made a false declaration to the Grand Jury (in violation of 18 U.S.C. Section 1623) as to the price he paid for a house in Florida (assertedly to conceal some of the extortion proceeds). The prosecution was politically sensitive as Petitioner Fulle was Cook County Chairman of the Republican Party and a target of United States Attorney James R. Thompson, who needed a conviction of a major Republican in order to enhance his image as a "neutral two-fisted prosecutor" for the purpose of seeking the post of Governor of Illinois. On his orders, the matter was assigned to two Assistant United States Attorneys, one of whom was Anton Valukas, whose father was a politician who had been opposed by another on orders of Petitioner. During the preparation of the case (but only discovered at trial and subsequently) important evidentiary material in the nature of interview notes, some of which are believed to have contained exculpatory evidence, were systematically destroyed and only favorably laundered statements were presented to the Grand Jury. Some of the destroyed materials could have

conclusively established in documentary form that key prosecution witnesses Adams and Zizzo made wholly inconsistent statements and that, in the Zizzo instance, Count III of the indictment was wholly negated by the sole witness who testified to it. The material destroyed was discoverable under 18 U.S.C. Section 3500 and required to be safeguarded under 18 U.S.C. Section 2071.

The indictments charged the alleged offenses in seven counts which, when grouped according to "transactions", were:

The Origer Counts

Count I charged Fulle with wrongfully using his position as Cook County Commissioner to obtain $10,000.00 from Thomas Origer during 1970 by, in effect, removing obstacles to a favorable rezoning of a 96 acre tract of land in which Origer was party in interest.

Count IV charged Fulle with making a false declaration before the Grand Jury when he denied receiving such payment.

Count VII accused Fulle of falsely swearing to a 1970 Income Tax Return which failed to include such sum as income.

The Sellergren Counts

Sellergren, Inc. was the owner and applicant to rezone a 66 acre suburban tract which was the subject of Count II. This count charged Fulle with using his position to obtain $20,000.00 from agents of the Company to remove obstacles to further zoning permits in the year 1970.

Count V charged Fulle with making a false declaration before the Grand Jury when he denied receiving any such payment.

Count VII accused him of falsely swearing to a 1970 Income Tax Return which failed to include this sum as income. Since the payoffs charged in Counts I and II relate to the tax year 1970, Count VII assumed both the Origer Count and the Sellergren Count to be true. (Tr. 1266, 1271, 1272).

The "Pattern" Counts

Count IV charged Fulle with falsely swearing that he had not received payoffs on five other various zoning matters involving Thomas Origer, which took place between 1966 and 1969.

Count VI accused Fulle of falsely swearing to a 1968 Income Tax Return that did not include some of the alleged payoffs as income.

These latter transactions were not charged as Counts of extortion but were indicated per a Bill of Particulars prior to trial.

The Zizzo Count

Count III in effect charged Fulle with making a false declaration before the Grand Jury concerning the actual purchase price and the amount of the downpayment on a Hollywood, Florida home purchased from Joseph Zizzo.

At the trial, Respondent presented evidence that Thomas Origer was the sole owner of Origer Builders from 1965-1971. (Tr. 430, 431) As such, he had been engaged in the buying, development, and selling of large plots of real estate within the jurisdiction of the County Board's zoning authority. (Tr. 431, 432) He had been the subject of a criminal tax investigation by the Department of Justice during the years 1971, 1972, 1973 and 1974. (Tr. 434) On March 22, 1973, he appeared before a Federal Grand Jury and

invoked the Fifth Amendment. He was granted immunity in exchange for his testimony by agreement with the United States' Attorney. (Tr. 434, 435)

Sometime in late 1973 or early 1974 Origer first mentioned to government officials the alleged payoffs that became the subject of the instant indictment. (Tr. 575) The substance of his claim was that in 1966, Fulle had allegedly demanded cash payments in exchange for not using the power of a Commissioner to defer a zoning matter to stall Origer's rezoning applications. (Tr. 446-448)

James Sellergren was associated with his four brothers in Sellergren, Inc. from 1960-1972. The company was engaged in, among other things, real estate development and management. (Tr. 929-930) He testified that he contracted to purchase a 66 acre plot of land in Palatine, Illinois, at a sales price of $1,544,500 from a Mr. Gleich. His plan was to obtain permits for a greater amount of units than permitted under the zoning classification at the time of the contract. (Tr. 933-935) Howard Sellergren testified he assisted his brother, James, with the 66 acre project, raised the cash, and gave William Adams the envelope containing $20,000 which Adams claimed went to Fulle. (Tr. 1033-1051)

William Adams was Chairman of the Board of Adams Engineers in Chicago. (Tr. 824-826) His company installed plumbing, heating, sprinkler and air conditioning on contract. According to testimony, he became acquainted with James and Howard Sellergren when they agreed to favor him with contracts on their construction project in suburban Cook County, if he could get additional zoning permits for the land. (Tr. 332-333) To this end, Howard Sellergren

testified that he raised $90,000 in cash (Tr. 1038, 1044), $20,000 of which Adams said he delivered to Fulle on June 15, 1970. (Tr. 861-865) The balance, which James Sellergren said he never asked Adams about for four years (Tr. 1008-1009), Adams told of distributing to other persons to favorably influence the Sellergren application for additional permits. (Tr. 844-848) He also testified he gave Fulle another $10,000 in June of 1971 for assisting the Sellergrens in having Palatine annex the 66 acres, (Tr. 870) which had already been annexed.

Joseph Zizzo was executive vice president of the Parkway Bank and Trust Company and First State Bank of Chicago. (Tr. 1076) He had formerly been Village President of Harwood Heights and had been involved in various business transactions with Thomas Origer, including purchase of a 12 flat at a discounted rate in 1976. (Tr. 645, 683) He testified that he sold a home in Hollywood, Florida to Floyd Fulle on July 16, 1970, for $45,000. He said Fulle paid $20,000 as a downpayment, but insisted on drawing the contract and papers to reflect a $35,000 price with a $10,000 downpayment. Zizzo and Parkway Bank officials drew all contracts, deeds and closing statements, all of which showed a price of $35,000, including revenue stamps affixed.

The defense presented evidence that Origer had been upset with Fulle during 1970, and had complained to the Mayor of a Northwest community that Fulle was deferring his zoning matters. Origer had offered to finance the campaign of anyone who would run against Fulle. There was testimony that Origer's general reputation for truth was bad. (Tr. 1329-1330)

Mrs. Fulle established, and the Respondent Government did not rebut, that on the occasion Origer swore he gave Fulle $9,000 in cash in his office in Schiller Park (Tr. 588-592), the Defendant and his wife were attending a convention of travel agents in San Juan, Puerto Rico from September 17-24, 1968. (Tr. 1705-1906) The proof also showed that Fulle and his wife had been on a trip to Florida from June 10, 1971, to June 29, 1971. (Tr. 1709-1713) This was to rebut the testimony of Adams, who placed his claimed $10,000 cash payment to Fulle as happening on Saturday, June 12th or 19th, 1971. (Tr. 869-870, 903) The Respondent failed to rebut this testimony.

Nine present or former members of the Cook County Board of Commissioners were called by the defense, and they all testified to the good reputation for truth and veracity enjoyed in the community by Floyd Fulle. (Tr. 1400, 1449, 1456, 1467, 1471, 1539, 1541, 1563, 1566)

The defense attempted to elicit evidence tending to show that the accused was in no position to force payoffs in the manner suggested by the Government. He made an offer to prove, through the testimony of persons serving on the Board at the time, that Floyd Fulle had never approached them seeking to influence their votes in favor of the Origer or Sellergren properties. He established, and it was undisputed, that he, the Defendant, had voted against the passage of the 96 acre tract of Origer's, that was the subject matter of the alleged extortion. (Tr. 2010)

Prior to trial, Petitioner Fulle moved for a severance and separate trials on the Origer transactions, the Sellergren/Adams transactions and the Zizzo house sale, on the ground that they were misjoined in violation of Federal

Rules of Criminal Procedure 8(a) and 14. The motion was denied. Fulle also made numerous requests, before and during the trial, for statements and materials which were discoverable under 18 U.S.C. Section 3500 and Federal Rules of Criminal Procedure 16. While some materials were turned over, the requests were denied as to others including the material which had been destroyed. Both the severance and production of evidentiary material matters were preserved in Petitioner's Post Trial Motion, (along with the many errors during the course of the trial) and on appeal. Petitioner's Post Trial Motion was denied, a judgment of conviction on all counts entered and he was given concurrent sentences of five years, but no fines by the United States District Court for the Northern District of Illinois.

On appeal, the Court of Appeals rejected every assertion of error or held it "harmless". Despite the apparent lengthiness of the opinion, the court's consideration of many items was shallow or non-existent and the length due more to the many assignments of error to be dealt with rather than time spent in dealing with substance. This is particularly evident as to the first question presented here which was presented in the brief below as (Appellant's Brf. i):

> Joinder Of Counts And Denial Of Severance Prejudiced the Defendant Where Victim Companies Were Unrelated, The Alleged Modus Operandi Were Different, And The Third Charge Unrelated, Non-Relevant And Prejudicial.

The panel's order nevertheless refused to consider the misjoinder issue saying:

> Defendant is not contesting on appeal the validity of joinder of offenses pursuant to Federal Rules of Criminal Procedure 8(a). Defendant's focus is instead on

> the propriety of the trial court's denial of defendant's motion for severance. (App. p. 4a)

But both the misjoinder and the severance rulings were appealed and argued even though only one was considered. Moreover, the order does not even discuss the production and destruction of evidentiary material issues. This may be because while it was raised on brief it was highlighted in the Appellant's Reply Brief which (on oral argument) the panel indicated had not been received. Whereupon the Clerk of the Court of Appeals apologized and handed copies to them stating that he had only received it a week ago. Apparently, it still was not considered. For these reasons, Petitioner is unable to state how the panel ruled on these critical contentions as they subsumed in the panel's sentence, "After careful consideration, all other matters raised in defendant's brief are deemed to be without merit." Other matters in the panel's affirmance of the conviction will be discussed where pertinent in the Reasons which follow.

REASONS FOR GRANTING THE WRIT

1.

The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to when Misjoinder of Offenses Denies a Defendant's Right to Due Process and Violates Federal Rules of Criminal Procedure 8(a) and 14.

This case offers this Court the opportunity to seriously consider the extremes to which some lower federal courts have gone in straying from the original intent of Federal Rules of Criminal Procedure 8(a) and 14. Inexplicably, to the practicing bar, this Court has recently denied certiorari to a series of cases which conflict with those of other circuits as to the intent of those Rules on the issue of "sandbagging". "Sandbagging" is a term used to illustrate the situation of a defendant who faces numerous unrelated and artificially multiplied charges which leave defense efforts nugatory in the absence of severance because their cumulative impact is overwhelming. It has become a hallmark of prosecutions in one district in the Seventh Circuit in political cases. See especially *United States* v. *Pacente,* 490 F. 2d 661 (7th Cir. 1973), *rev'd on reh. en banc,* 503 F. 2d 243 (7th Cir. 1974), *cert. den.,* 419 U.S. 1048; *United States* v. *Isaacs,* 493 F.2d 1124 (7th Cir. 1974), *cert. den.* 417 U.S. 976, *reh. den.* 418 U.S. 955 (the "Kerner case" involving the late Governor of Illinois); *United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974); and *United States* v. *Barrett,* 505 F.2d 1091 (7th Cir. 1974), *cert. den.,* 421 U.S. 964, *reh. den.* 422 U.S. 1049 (1975).

In the present case, as in many of those just cited, a defendant who takes a position of complete innocence is not

only required to defend a primary charge or charges, but is sandbagged with additional charges whose proof is entirely or wholly dependent on the primary. By asserting his innocence before the Grand Jury, Petitioner became subject to charges of perjury even before the truth or falsity of the underlying charges has been determined. Again, using a presumption of guilt, he is made to defend against non-reporting of income which it has yet to be proved that he received. The defendant is crushed by the sandbags of cumulative charges which depend on setting aside the presumption of innocence even before the trial at which it is imperative it be preserved.

Two distinct and crucial errors were made with respect to this indictment. First, it joined alleged offenses which failed to meet the commonality requirements of Rule 8(a). Secondly, it was tried in one trial, before one jury, with great prejudice to Petitioner in violation of Rule 14.

As to the first of these issues, the Court of Appeals was silent. Rule 8(a) permits joinder if some commonality exists among the offenses charged. Here there was none. Extortion, perjury over abuse of office, non-reporting of taxable income, and falsely stating the purchase price of a house are hardly offenses "of the same or similar character, or are based on the same act or transaction." In *United States* v. *Quinn,* 365 F. 2d 256 (7th Cir. 1964), the court held there was misjoinder because "(e)ach count of the indictment failed to allege 'a common scheme or plan' connecting the different transactions, and no claim is made here that there was proof thereof." *Id.* at 264. There is no question here but that different transactions of dissimilar character were involved in the charges. At the very least, there were the Origer pattern ones, the Origer 1970 one, the Sellergren/

Adams one, two instances of fraudulent income tax returns which were two years apart, alleged perjury before a grand jury four years after the last and *eight years* after the first of the alleged extortions and also a false declaration as to a home purchase price in another state. In *United States* v. *Carter,* 475 F. 2d 349 (D.C. Cir. 1973), the court held that there was misjoinder where there was a nine count indictment charging offenses arising out of two armed robberies and one assault within six days "(t)here was no evidence of a common scheme or plan embracing the commission of all the offenses." *Id.* at 351 Similarly, as to two robberies of different locations approximately two months apart in *Cross* v. *United States,* 335 F. 2d 987 (D.C. Cir. 1964). *See also United States* v. *Marionneaux,* 514 F. 2d 1244 (5th Cir. 1975) where the joinder of two separate charges of conspiracy to obstruct justice was held to be improper and inherently prejudicial.

Rule 8(a) was not new, even at its birth, because it was "substantially a restatement of existing and familiar law". *Rakes* v. *United States,* 169 F. 2d 739, 743 (4th Cir. 1948), *cert. den.,* 335 U.S. 826. *See also Ingram* v. *United States,* 272 F. 2d 567, 568 (4th Cir. 1959). Deep concern was voiced at the time of drafting lest the new rule be more permissive than the past law it was supposed to codify. 1 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 746-51 (1966). The applicable principles were stated by this Court over eighty years ago in *McElroy* v. *United States,* 164 U.S. 76 (1896), which held (*id.* at 79-80) as to its indictments:

> "• • • in our opinion, they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other,

> committed at different times and not provable by the same evidence."

What was then so clear has now become confused and numerous conflicting cases abound beyond those cited here. *See* 1 L. ORFIELD, *supra* at Sections 8:51-8:54.

Nowhere has there been any allegation that there was a "common scheme or plan". Viewed in the light most favorable to Respondent, there were seven distinct extortions over a four year period, some involving direct payment, one not, and with different victims and *modus operandi.* The most direct parallel may be in the law of conspiracy where misjoinder is a constant risk. An opposite decision is that in *Kotteakos* v. *United States,* 328 U.S. 750 (1946) where this Court held (*Id.* at 773):

> We do not think that Congress, . . ., or this Court, . . ., intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, *when the only nexus among them lies in the fact that one man participated in all.* • • • (Emphasis added)

The panel below should have considered the issue, adopted the parallel and voided the result due to the misjoinder. Their own precedent already existed in *United States* v. *Vavelli,* 407 F. 2d 735 (7th Cir. 1969), not in the other recently decided political trial appeals.

This Court should avail itself of the opportunity to end the confusion below in the application of Rule 8(a). There have been repeated efforts undertaken to reform this area by the American Law Institute and others. 1 L. ORFIELD, *supra* at Sections 8:68-8:69. Though using language similar to Rule 8(a), the American Bar Association's Com-

mentary makes clear that most other jurisdictions view the scope of the concepts more narrowly than the Seventh Circuit did in *United States* v. *Pacente, supra.* ABA STANDARDS, JOINDER AND SEVERANCE Section 1.1 (a) & (b) Commentary (1968). Indeed, the ABA goes so far as to give the defendant an absolute right to severance, if desired, thus putting the onus on him and his counsel to weigh the risks. ABA STANDARDS, *Supra* at Section 2.2(a) and Commentary.

The "sandbagging" of charges was also improper under Federal Rules of Criminal Procedure 14 and subjected Petitioner to extreme prejudice. The categories of prejudice were well formulated in *Drew* v. *United States,* 118 U.S. App. D.C. 11, 331 F.2d 85 (1964). The Court reasoned that an accused facing multiple charges:

> (a) may become confused or confounded in presenting separate defenses,
> (b) risks the jury using the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt on the other crimes charged,
> (c) hazards the jury cumulating the evidence of the various crimes charged and finding guilt, when, if considered separately, it would not so find,
> (d) faces latent hostility engendered by the charging of several crimes as distinct from only one.

The standard applied in *Drew, supra,* required a severance under Rule 14 unless evidence of the joined offenses would be mutually admissible, or if not, the evidence is sufficiently "simple and distinct" to mitigate the danger of cumulation.

From the face of the indictment itself, it is clear that the instant case involved anything but "simple and distinct" evidence. It alleged irregularities in connection with land-zoning. This meant documents. The testimony of Michael

Igoe laying a foundation for the Cook County Board files pertaining to the indictment covered more than a hundred pages of this record. (Tr. 302 et cet.) Each land transaction spans many months and contains many documentary entries which may or may not affect the Government testimony they parallel. Finally, the jury received checks, bank records, and voluminous documentary evidence of claimed relevance to both Counts. To defend at one trial against such an amalgamation was like a batter given one swing to hit multiple balls. What was the effect, for instance, in a case where the Clerk of the Board testified that it was rare for a zoning ordinance once deferred by a Commissioner to be called up again, (Tr. 385-386) of the same jury hearing that it happened in six of the instances being prosecuted? How could an instruction fend off the ultimate conclusion that the Government had taken six cases of deferral and uncovered bribes? It is submitted that here, as in the instance of the mutually inadmissible evidence cited below, cumulation and prejudice were inevitable if these cases were tried together. Cross-inferences could not be cured by an instruction. The accused found himself encompassed in a multitude of charges. It was an abuse of discretion to refuse to grant him the right to defend, at least, against the Counts that were inherently related in separate trials. Indeed, part of the Court's instruction here told the jury that Counts I and II were related. (Tr. 2075)

Yet, the panel below distinguished the case on which Petitioner had placed great reliance, *United States* v. *Quinn,* 365 F. 2d 256 (7th Cir. 1966), because "the evidence was so complex and confusing . . ." (App. 4 n. 5) Unlike the seven count indictment here (in which one count charges six distinct offenses and another two more), the *Quinn*

case involved four counts covering two transactions in which the defendant illegally compelled a rent pre-payment by his federally insured savings association and, on another date, illegally exchanged a check of another business for one of the savings association. There, too, there was a "sandbagging" and the opinion voided two counts by holding that the prosecution improperly tried to "pyramid crimes". *United States* v. *Quinn,* 356 F. 2d at 259.

The panel's order considered important that "there has been no showing that the jury was unable to apply the evidence to the proper count". (App. id.) How could there be when it was all admitted and all counts tried together and a single verdict rendered. It is not possible to say what the jury thought. Petitioner can only submit the caveat of Judge Hand in *United States* v. *Lotsch,* 102 F. 2d 35, 36 (2d Cir. 1939), *cert. den.* 307 U.S. 622, quoted and relied on in *Quinn* (at 265):

> "There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of accused's guilt, the sum of it will convince them as to all."

It is not possible here to say that the evidence was "simple and distinct". *Drew* v. *United States,* 331 F. 2d *supra,* at 91. *See United States* v. *Carter,* 475 F. 2d *supra,* at 351. *See also United States* v. *Varelli,* 407 F. 2d, *supra* at 744-47, reversing the conviction relying on *Kotteakos* v. *United States, supra,* and *Schaffer* v. *United States,* 362 U.S. 511 (1960) (misjoinder of defendant).

The crucial vice in misjoinder is that the jury will take testimony on some counts and apply it to others which evidence would have been excluded in a trial only on the

first counts. In essence, the irrelevant evidence tends to appear cumulative and corroborative. This is especially so where, as here, there is a great imbalance in the counts, e.g., Count IV charging five extortions versus Count III charging a false declaration as to the purchase price of an out-of state home. Note the similarity to the situation of joinder of multiple defendants where one is deep in a conspiracy and another asserts he was a mere innocent out on the distant fringe. *See, e.g., United States* v. *Mardian,* ..... U.S. App. D.C. ....., ... F.2d ..... (No. 75-1383, Oct. 12, 1976) (slip op'n at 7-10).

In addition, the joinder of perjury counts work their own special prejudice. As stated by Chief Judge Swygert in *United States* v. *Pacente,* 490 F.2d *supra* at 664:

> The Government responds that this case is no different from any other one, "since the existence of the indictment is an obvious indication that the Grand Jury felt that the defendant was guilty" and therefore there was no prejudice to Pacente in trying both counts together. While this observation may have applicability to a multicount indictment on various substantive charges, we find it to be an over-simplification and inapplicable to the situation before us. It is one thing for the petit jurors to believe that the grand jury concluded that probable cause existed that the defendant committed the substantive offense. It is quite another thing, however, for the petit jurors to know that the grand jurors—laymen like themselves—believed the defendant to have lied to them. Such knowledge serves to impair a defendant's ability to effectively defend himself on the substantive charge. In the event the defendant testifies concerning the substantive charge, the knowledge of the false declaration count has the effect of informing the petit jurors that the defendant's testimony is not to be believed. Accordingly, the defendant

is impeached as soon as he reaches the witness stand. On the other hand, in the event that defendant chooses not to take the stand the substantive offense is substantially reinforced by the addition of the false declaration count.

Additionally, the joinder of the substantive count with the false declaration count tends to shift the burden of proof to the defendant who must prove that he did not lie to the Grand Jury. The problem, however, is that there is no way to confront and defend against the false declaration count. • • •.

The prejudice which inured to the defendant here is further demonstrated by reference to a situation where the Government attempts to introduce at the trial of a defendant charged with a substantive offense only, evidence that defendant had also been indicted for perjury in connection with the same substantive charge. The evidence of the mere fact of the indictment, however, would clearly be inadmissible because of the resulting prejudice to the defendant. IIA Wigmore on Evidence, Section 980a (Chadbourn Rev. 1970).

The subsequent 4-2 reversal of that unanimous opinion may not even represent the law of the Seventh Circuit since its recent changes in composition. But it does represent a serious step backward in ignoring the unique problems created by this type of misjoinder. *See* Note, *Joinder of Substantive Offenses and Perjury in One Indictment*, 66 J. CRIM. L. & CRIMINOLOGY 44, at 51 and 55 (1975).

The order below relied on two safety positions in the event it was in error. The first was that an instruction was given to the jury to limit the evidence to each appropriate count. Such limiting instructions have been commonly viewed as ineffectual by such authorities as Justices Frankfurter and Jackson, and Judges Learned Hand, Frank and

Traynor. *See* Note, 66 J. CRIM. L. & CRIMINOLOGY, *Supra* at 52, n. 77, and Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553, 554 (1965) and authorities listed in n. 7. Indeed, they may only serve to preserve in memory the very evidence jurors are instructed to ignore for a particular purpose. *See* Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 265-66 & nn. 7-16 (1966). Nor does concurrent sentencing provide a remedy (though used here) as it ignores the possibility that a defendant might have been acquitted or received separate short or suspended sentences on each count. Note, 74 YALE L.J., *supra* at 555.

Finally, the opinion below seeks to apply a specious species of the harmless error doctrine by assuming that the evidence of each offense charged would have been admissible in separate trials as evidence of "other crimes" under Federal Rule of Evidence 404(b). This Rule provides that "(e)vidence of other crimes, wrongs or acts" is only admissible if "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident". The use of such evidence is essentially in rebuttal and where one or more of the specific purposes has been placed in issue. *See* Advisory Committee's Note to Rule 404. The Court below assumed, without analyzing, that the evidence would be "mutually admissible" under the test in *Drew* v. *United States*, 331 F.2d *supra* at 89-90, and *Robinson* v. *United States*, 148 U.S. App. D.C. 58, 70, 459 F. 2d 847, 859 (1972). *See also* Note, 74 YALE L.J. *supra* at 557. However, the evidence would not be admissible to show intent where, as here, the defendant asserts he received nothing and did no wrong so that intent and its Rule 404(b) cog-

nates were not even in issue. Even then, under the same court's decision in *United States* v. *Braasch,* 505 F. 2d 139, 151 (7th Cir. 1974):

> It matters not whether a public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not perform acts related to his duties which can only be undertaken because of his official position."

Simply stated, the purpose or intent is no longer criminal, only the use of public office to obtain improper payments matters under 18 U.S.C. Section 1951's unusual type of extortion. As it would not be admissible under Rule 404, the test is not met. The failure to meet it leaves such evidence in the same category as the prior conviction in *United States* v. *Harding,* 525 F. 2d 84 (7th Cir. 1975). Apparently little has changed since Justice Clark found "'harmless error' is swarming around the 7th Circuit like bees". *United States* v. *Jackson,* 429 F.2d 1368, 1373 (7th Cir. 1970). *See also, United States* v. *Richards,* 430 F. 2d 1240, 1243 (7th Cir. 1970). Now, as then, the Government sought to cover over its error as harmless. Writing for a unanimous panel Mr. Justice Stevens (then Circuit Judge) rejected the contention. *Supra,* 525 F. 2d at 91. So, too, here.

2.

The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Preservation and Production of Evidentiary Material—

(a) Before the Grand Jury and at Trial in Violation of a Defendant's Right to Due Process and 18 U.S.C. Section 2071; and

(b) At and Before the Trial in Violation of 18 U.S.C. Section 3500 and Federal Rule of Criminal Procedure 16 and This Court's Decision in Brady v. Maryland, 373 U.S. 83 (1963).

Even on the most important and weighty matters, this Court has sometimes denied certiorari while waiting to see how the various circuits will respond to a newly promulgated view or concept. Such was the situation, for example, with respect to parole revocation hearings and the new direction taken in *Hyser* v. *Reed,* 115 U.S. App. D.C. 254, 318 F.2d 225 (1963) *cert. den., subnom Thompson* v. *United States Board of Parole,* 375 U.S. 957. However, there comes a time when a sufficient number of circuits have ruled and a clearly seen alignment emerges.

Such is the way as to this issue, viz. the destruction of agent interview notes and related discovery matters. At least our circuits have clearly held that it was error not to preserve and require production of an agent's rough interview notes under either the Jencks Act, 18 U.S.C. Section 3500, or under Federal Rule of Criminal Procedure 16. *See, e.g., United States* v. *Johnson,* 525 F.2d 999, 1003-4 (2d Cir. 1975), *cert. den.* 96 S.Ct. 1127 (1976); *United States* v. *Fallen,* 498 F.2d (8th Cir. 1974); *United States* v. *Harris,* 542 F.2d 1094 (9th Cir. 1976); pet'n for cert. filed (December 14, 1976) and *United States* v. *Lewis,* 511 F.2d 798 (D.C.

Cir. 1975). Two circuits have gone so far as to hold proper the imposition of sanctions in such a situation, setting aside prior conflicting cases along with the defensive position that it was "normal" or "regular" agency practice. *United States* v. *Harrison,* 524 F.2d 421, 431-32 *esp.* 431, n.32 (D.C. Cir. 1975); and *United States* v. *Harris, supra,* rejecting *Ogden* v. *United States,* 323 F.2d 818 (9th Cir. 1963), *cert. den.,* 376 U.S. 973 (1964). The Fourth Circuit approved a trial court order to the same effect in *United States* v. *Wilcox,* 507 F.2d 364, 374 (4th Cir. 1974), *cert. den.,* 420 U.S. 979 (1975). Another is a bit ambiguous but appears to be aligned in favor of disclosure in an older case. *Papworth* v. *United States,* 256 F.2d 125, 129-30 (5th Cir. 1958), *cert. den.,* 358 U.S. 854.

The conflict is confirmed by those courts which have held against disclosure. *Walsh* v. *United States,* 371 F.2d 436 (1st Cir. 1967); *United States* v. *Fioravanti,* 412 F.2d 407, 411-12, n.12 (3d Cir. 1969), *cert. den.* 396 U.S. 837; and *United States* v. *Krilich,* 470 F.2d 341, 351 (7th Cir. 1972), *cert. den.,* 411 U.S. 938 (1973). See also cases cited in *United States* v. *Harrison,* 524 F.2d *supra,* at 430-31, nn.25-28. It should be noted that the special circumstances of each case have caused internal circuit conflicts. Prior to the decision in the *Krilich* case, the lower court here had such a record. Compare *United States* v. *Clancy,* 276 F.2d 617, 634 (7th Cir. 1960), *rev'd* on other grounds, 365 U.S. 312 (1961); *United States* v. *De Leon,* 498 F.2d 1327, 1333-34 (7th Cir. 1974) and *United States* v. *Cleveland,* 507 F.2d 731 (7th Cir. 1974), with *United States* v. *Battaglia,* 410 F.2d 279, 283 (7th Cir. 1969), *cert. den.,* 396 U.S. 848. The opinion below lumped this assertion of error together with all the others is denied in its omnibus final sentence, thereby applying the *Krilich* view, even if in tacit form.

Petitioner respectfully submits that there are additional authorities, not commonly invoked, in favor of retention and disclosure of such evidence. As to retention, *United States* v. *Bryant,* 142 U.S. App. D.C. 132, 142, 439 F.2d 642, 652 (1971); *United States* v. *Harrison,* 524 F.2d, *supra* at 422-23, n.1 and 431, n. 32 and *United States* v. *Harris, supra,* all hold that there is a clear obligation not to destroy such notes because they may be useable in defense of a subsequent prosecution.

The purpose of the Jencks Act, 18 U.S.C. Section 3500, is to afford the defense an opportunity to impeach witnesses. *Palermo* v. *United States,* 360 U.S. 343 (1959); *United States* v. *Wentzel,* 311 F.2d 164, 171 (4th Cir. 1962). Since such notes may, as here, be reasonably believed or even known to have contained exculpatory evidence, their retention and non-destruction would also be required by *Brady* v. *Maryland,* 373 U.S. 85 (1963); *See United States* v. *Harrison, supra* at 431. Under these circumstances, the materials become part of the record and papers in a case which are required to be kept. Their destruction was a willful violation of 18 U.S.C. Section 2071. No one was in a better position to know this than the U.S. Attorney who mandated that destruction by insisting that all such notes be laundered so as to produce a document only composed of statements favorable to the prosecution in a manner coldly calculated to deprive an accused of his right to due process both before the Grand Jury and at trial.

The Grand Jury here was abused by the prosecution. No effective opportunity was afforded its members to screen out crime from non-crime, ZIZZO's laundered statement only contained his accusation made after repeated "interviews" at which he was "prompted" by agents from the

I.R.S. and the U.S. Attorney's Office including the prejudiced Anton Valukas. The notes of his first interview, where he freely made a statement totally consistent with that of Petitioner, was wholly exculpatory. But the Grand Jury was deprived of this information by its contrived exclusion from the ZIZZO "statement" document they were finally given. So, too, with Adams' often faulty memory. Indeed, it was so faulty that the Government was forced to move to strike two counts of its own indictment when this often confused 69 year old man had fixed on an alleged transaction in January (when it could not have occurred) instead of some time in early Summer. Similar inconsistencies abound in the material involving Origer's numerous versions of his past. These "statements" were abuses of due process as the Grand Jury was led to indict on the basis of perjured testimony with excluded exculpatory evidence. *See, e.g., United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974); *United States* v. *Gallo,* 394 F.Supp. 310 (D. Conn. 1975); *United States* v. *DiGrazia,* 213 F.Supp. 233 (N.D. Ill. 1963); *United States* v. *Daneals,* 370 F.Supp. 1289 (W.D. N.Y. 1974); and *United States* v. *Thomas,* 320 F.Supp. 527 (D.D.C. 1970). *See also Johnson* v. *Superior Court,* 124 Cal. Rptr. 32, 539 P.2d 792 (1975) construing a state Grand Jury statute highly similar to the federal statute and practice. *Cf. United States* v. *Poole,* 379 F.2d 645 (7th Cir. 1967). The presentation to the Grand Jury of these laundered documents and their use as a barrier to effective examination of the witnesses, including the witnesses' inconsistencies and exculpatory comments, prevented that body from properly performing its function in violation of Petitioner's rights to indictment and due process.

Equally damaging was the absence of these crucial statements at trial. Small portions of laundered documents were

treated as Jencks Act material and turned over belatedly and well into the trial when they should have been available before trial under the *Brady* rule and Rule 16. The exculpatory material and the notes were refused. Of course, much was no longer available. How important are such notes? Considering that the Government's case depended upon the jury's believing the testimony of immunized witnesses and the material could have impeached them, it was no different than the analogous material discussed by this Court in *Alderman* v. *United States,* 394 U.S. 164 (1969):

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case." 394 U.S. at 182.

Note the disapproval in the *Alderman* case of the *in camera* approach also relied on in the trial court below in the instant case. *See also Dennis* v. *United States,* 384 U.S. 855 (1966).

The destruction and witholding of favorable evidence before the Grand Jury and at trial deprived Petitioner of his right to fair proceedings. As this Court said in *Brady* v. *Maryland, supra* at 87-88:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request vio-

lates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

"The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."

3.

The Decision Below Conflicts with Decisions of This Court and Other Courts of Appeals as to the Cumulative Effect of Numerous Trial Errors and Judicial Bias in Denying a Defendant's Right to Due Process.

Petitioner will not burden this Court with a lengthy recitation of the trial errors and instances of judicial bias. They are well documented in the transcript and identified and discussed in the Appellant's Brief and Appellant's Reply Brief to the Court of Appeals, both of which have been made a part of the record of the case and are incorporated herein as if set out in *haec verba*. In those briefs, a special point was made that the numerous trial errors even if individually harmless (as some were found to be on appeal, *see* App. p. 8), denied a fair trial because of their cumulative effect. It was especially argued that a clear

imbalance was created by giving permission to one side to do things that the other side was not. For example, the Government was permitted to distribute a chart to the jury (similar to that used as an appendix in *United States* v. *Varelli, supra*), while the defense was denied the use of an easel to present its charts. The Court of Appeals ignored the issue entirely. It also erroneously treated the arguments about the judicial bias as only having scope, rather than constitutional dimension. When a judge is making faces at the jury when testimony favorable to the defense is being given (but not otherwise), when he loudly taps his fingers and by gesture and grimace interrupts and harasses the defense, and when he goes off the record and threatens defense counsel with contempt if they try to raise any objection to these matters on the record, the issue to be decided is whether the defendant was deprived of due process. But the court below only held that there was no violation of 28 U.S.C. Section 455, as the bias was directed toward "counsel" and was not, therefore, prejudicial to a "party". That is totally unresponsive and has the effect of depriving defendant of due process by refusing to fairly review the matter on appeal.

Petitioner recognizes that the many references in this argument to refusals of the Court below to consider the issues raised here could lead this Court to order a remand to the Court of Appeals to discuss the same. Petitioner respectfully suggests that granting the petition would avoid extending the proceedings. On remand, the panel would consider itself bound by the *en banc* decision in the *Pacente* case and would also undoubtedly apply the decision in *United States* v. *Krilich*. The effect would be to send Petitioner back to this Court in much the same posture as at present.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

ELIOT A. LANDAU
6944 Sun Drop Avenue
Woodridge, Illinois 60515

WILLIAM R. JACOBS, II
7 S. Dearborn Street
Chicago, Illinois 60603

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued June 8, 1976

October 4, 1976

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 75-2126 vs.

FLOYD T. FULLE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 75 Cr 86,
BERNARD M. DECKER, Judge.

ORDER

Defendant-Appellant Floyd T. Fulle, hereinafter referred to as defendant, raises three issues on appeal. First, defendant contends that the district court improperly de-

nied defendant's Motion to Sever. In addition, defendant contests the validity of various evidentiary rulings by the trial court. Defendant also asserts that the trial judge should have removed himself from this case. For the following reasons we affirm the conviction of defendant.

Defendant was found guilty in a seven count indictment[1] of extortion, false declarations to the grand jury, and filing false income tax returns. These charges resulted from defendant's alleged misuse of his position as a County Commissioner on the Cook County Board. Count I charged that in 1970 defendant extorted $10,000 cash from Thomas Origer to permit a 96 acre tract of land owned by Origer to be rezoned and developed in violation of 18 U.S.C. § 1951. Count II charged that in 1970 defendant extorted $20,000 from William Adams to permit a tract held by the Sellergren Company to be rezoned in violation of 18 U.S.C. § 1951. Count III charged that defendant made a material false declaration before a federal grand jury in violation of 18 U.S.C. § 1623 in 1974 when he stated that he had paid Joseph Zizzo $35,000, with $10,000 down in cash, for the purchase of Zizzo's home in Hollywood, Florida, in 1970. Count III alleges that defendant in reality purchased this home for $45,000 with a downpayment of $20,000 in cash. Count IV charged that defendant made a material false declaration before a federal grand jury in violation of 18 U.S.C. § 1623 when he denied receiving money from Origer on each of six occasions, including the Count I transaction. Count V charged that defendant made a false declaration in violation of 18 U.S.C. § 1623 when he denied receiving money from William Adams relating to a transaction which was the subject matter of Count II. Counts VI and VII charged defendant with filing a false federal income tax return for 1968 and 1970 respectively in violation of 26 U.S.C. § 7206 by failing to include as taxable income the receipt of these extorted sums.

---

[1] An eighth count was dismissed on the Government's motion prior to trial

I.

Severance

Defendant asserts that the trial court abused its discretion in denying defendant's Motions for Severance.[2] Defendant asserts that since joinder of offenses is the prerogative of the Government, severance should be regarded as a right reserved for the defense. Defendant relies on *Drew* v. *United States,* 331 F.2d 85 (D.C. Cir. 1964), for the proposition that severance is required unless the evidence is so simple that the jury can easily separate what relates to each count or unless the evidence of each of the crimes on trial would be admissible in a separate trial for each offense. Defendant contends that the evidence is not simple and distinct since the allegations of irregularities in zoning required proof by numerous documents and transactions spanning many months. In addition, defendant argues that had Count I and Count II been tried separately, evidence relating to Count I would not have been admissible in a trial on Count II, and vice versa, since the offenses alleged in each count are totally unrelated. Since evidence from Count II would not be admissible in a separate trial for Count I, defendant further asserts that the joint trials of Counts I and II deprived him of the ability to argue that Origer's testimony was uncorroborated. Defendant also complains that in light of the testimony by the Clerk of the Board that it was rare for consideration of a zoning ordinance once deferred by a Commissioner to be called up again over his objection, repetition of testimony that this occurred was prejudicial. Finally, defendant argues that where multiple offenses are charged, conviction on one count enhances the probabilities of conviction on the other counts.

---

[2] Defendant filed a Motion for Severance prior to trial on April 15, 1975. The court denied defendant's motion on April 17, 1975. Defendant filed a post-trial Motion for Severance on November 11, 1975. The court denied defendant's motion on December 10, 1975.

This court agrees with the Government that the trial court did not abuse its discretion in denying defendant's Motion for Severance.

Defendant is not contesting on appeal the validity of joinder of offenses pursuant to Fed.R.CrimP. 8(a).[3] Defendant's focus is instead on the propriety of the trial court's denial of defendant's motion for severance.

Federal Rule of Criminal Procedure 14[4] provides in part that if a defendant is prejudiced by a joinder of offenses, "the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires." "Whether a severance of related offenses should be granted must remain largely within the discretion of the trial judge upon consideration of the circumstances of the individual case." *United States* v. *Barrett,* 505 F.2d 1091, 1106 (7th Cir. 1975), *cert. denied* 421 U.S. 964, *reh. denied* 422 U.S. 1049. The moving party bears the heavy burden of showing prejudice, "that he will be unable to obtain a fair trial without severance." *United States* v. *Crouch,* 528 F.2d 625, 631 (7th Cir. 1976). "Reversal of a conviction on the ground

---

3 Fed.R.Crim.P.8(a) provides:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

4 Fed.R.Crim.P.14 provides:

If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

of abuse of discretion for failure to sever an offense under Rule 14 is almost non-existent." *United States* v. *Barrett, supra.* "Absent a strong showing of prejudice, the denial of a motion for severance will not be reversed on appeal." *Crouch,* 528 F.2d at 631.

Defendant failed to make such a strong showing of prejudice in the case at bar.

Defendant has failed to demonstrate that the evidence and issues are so complicated that the jury could not keep separate evidence relating to each count.[5] Merely alleging that the evidence was not simple and distinct since large numbers of documents and transactions are involved which cover many months is not sufficient to demonstrate improper use of evidence by the jury. As the Government correctly points out in its brief, the only inherent complexity in the case arose from the introduction of banking documents and County Board records. This evidence was merely corroboration of the testimony of key witnesses.

Although the indictment charged defendant with various offenses in seven separate counts, the offenses allegedly committed by defendant break down into the following categories relating to separate transactions: Counts I and IV allegedly relate to defendant's transactions with Origer; Counts II and V relate to transactions with Adams and the

---

5 *United States* v. *Quinn,* 365 F.2d 256 (7th Cir. 1966), a case on which defendant places principal reliance, is distinguishable from the case at bar. In *Quinn,* the evidence was so complex and confusing that the judge had difficulty grasping the Government's position concerning charges contained in the different counts and the relationship which they bore to each other. In addition, the Government had difficulty explaining the relationship of the different counts to the court. The court failed to issue limiting instructions and it was, therefore, next to impossible for the jury to differentiate between proof as it pertained to the different counts.

In the present case, there has been no showing that the jury was unable to apply the evidence to the proper count. In addition, there was no indication of confusion on the part of the judge or counsel for either party on this question.

Sellergren Company; Count III relates to the transaction with Zizzo; and Counts VI and VII relate to the alleged submission of false tax returns for 1968 and 1970.

In addition, the ability of the jury to consider evidence on each count separately was reinforced by the trial court's instructions. The trial court instructed the jury to consider separately each count and the evidence relating thereto:

> The defendant, in effect, is charged with a separate crime in each count of this indictment and each crime and the evidence pertaining to it should receive your separate consideration and the defendant's guilt or innocence of the crime charged in one count should not affect your verdict as to any other count and the defendant is not on trial for any act or conduct not alleged in the indictment. (Tr. 2074.)

The court also read the indictment count by count to the jury. This served to further separate the substance of each count for the jury.

Defense counsel in closing also assisted the jury in considering separately the relevant evidence for each count. Defense counsel separated out the evidence relating to the Origer transactions, the Adams-Sellergren transactions, the Zizzo transactions, and the tax return questions and argued each separately to the jury.

Even if we assume that the evidence was not subject to proper application by the jury, "separate trials [would] offer no panacea where the evidence of each of the crimes charged would have been admissible in separate trials." *Holmes* v. *Gray,* 526 F.2d 622, 625 (7th Cir. 1975). Defendant incorrectly asserts that evidence relevant to each respective Origer count would not have been admissible in a separate trial of the Adams-Sellergren counts, and vice versa. Evidence of other crimes is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Rule 404(b), Federal Rules of Evidence. "All of the counts in-

volved directly or indirectly, the use of official position for the benefit of private interest for a pecuniary consideration." *Barrett,* 505 F.2d at 1105. Evidence relating to the Origer counts and the Sellergren counts would be mutually admissible in separate trials on the issue of knowledge and intent as tending to show a consistent pattern of conduct. See *United States* v. *Allstate Mortgage Corp.,* 507 F.2d 492, 495 (7th Cir. 1974), *cert. denied* 421 U.S. 999.

Since the evidence would have been mutually admissible in separate trials, "the possibility that the jury would cumulate evidence or draw unreasonable inferences as to the criminal disposition of appellant would in no way be enlarged by the fact of joinder." *Smith* v. *United States,* 357 F.2d 486, 489 (5th Cir. 1966).

Any time multiple offenses are joined in a single trial, some prejudice will result. *Barrett,* 505 F.2d at 1106. The trial court however, must balance the possibility of prejudice against consideration of economy and efficiency in the use of the judicial process. *United States* v. *Isaacs,* 493 F. 2d 1124 (7th Cir. 1974), *cert. denied* 418 U.S. 955. The question of whether severance is warranted is not, as defendant asserts, a right reserved for the defense. The question of whether severance is appropriate is properly left to the sound discretion of the trial judge. We cannot say that the trial court abused its discretion in the present case.

II.

Evidentiary Rulings

Defendant argues that numerous evidentiary errors were committed by the trial judge. For the following reasons we do not believe that defendant was deprived of his right to a fair trial.

A. *Cross-Examination of Igoe*

Defendant contends that the trial court improperly limited his right to cross-examine Michael L. Igoe, Secretary of the Board of Commissioners. In the absence of an abuse

of discretion, however, this court will not disturb a trial court's ruling concerning the admissibility of evidence and the extent and scope of cross-examinations. *Smith* v. *Illinois,* 390 U.S. 127, 132 (1968); *United States* v. *Isaacs,* 493 F.2d 1124, 1162 (7th Cir. 1974), *cert. denied* 417 U.S. 976, *reh. denied* 418 U.S. 955.

After carefully examining this record, we do not believe that the trial court abused its discretion.

Defendant first alleges that the court improperly prohibited defense counsel from asking Igoe:

> Was there ever a commissioner that spoke up more for the rights of the municipalities and affected property owners than Commissioner Fulle? (Tr. 389.)

This court agrees with the trial judge in his ruling that the question was improper in calling for an opinion and exceeded the scope of direct testimony.

Defendant next alleges that the trial court improperly prevented him from making the following inquiry into whether a letter signed by Sellergren which evidenced an intent to donate 14 acres of land to the Village of Palatine was the reason for a change in zoning rather than interest evidenced by Fulle:

> So that in addition to the journal entry indicating Mr. Fulle's interest, this would—this letter marked 2-C-1 would appear to have been the real reason for the motion and the amended change, isn't that correct? (Tr. 398.)

The trial judge properly sustained the Government's objection to this question. The question was argumentative in form and called for speculation on the part of the witness.

Defendant also objects to the trial court's ruling which halted inquiry into the legal effect on deferment of a petition for rezoning in *Forest View Home Owners* v. *County of Cook,* 18 Ill. App. 3d 230 (2d Div. 1974). Defendant asserts that he was unable to adequately demonstrate that

Igoe had a lack of knowledge upon which to base his opinions. (Tr. 391-395.)

Once again we do not believe that the trial court abused its discretion in ruling that this inquiry went beyond the scope of direct where the witness testified only as to the practice before the County Board. In addition, a reading of this transcript demonstrates that inquiry was halted only after it was clear that Igoe had no knowledge of the case in question. Finally, as defendant points out, retired Board member Charles Chaplin testified that an application was deemed rejected after 60 days. (Tr. 1365.) Thus, defendant was able to introduce the evidence which defendant asserts was improperly excluded on cross-examination of Igoe. Even if error could be found in the trial court's ruling, therefore, it would be at most harmless error. *United States* v. *Keane,* 522 F.2d 534 (7th Cir. 1975), *cert. denied* 96 S.Ct. 1481.

B. *Examination of Cook County Commissioners*

Defendant asserts that the trial court improperly limited inquiry into whether defendant had ever influenced or tried to influence votes of the other Commissioners by money or other means. An examination of the transcript reveals that defendant's contentions have no merit.

Defendant was permitted to ask each Commissioner called to testify whether Mr. Fulle ever asked that Commissioner to vote for or against any of the subject rezoning matters. (Tr. 1429-30.) The court also permitted defendant to ask each Commissioner what his customary method of doing business was. (Tr. 1428.) Although allowing specific inquiry into these areas, the court sustained the Government's objection to asking each Commissioner whether defendant ever "influenced" him on the grounds that it was a conclusory question. Finally, defense counsel stated that he had no objection to not asking each Commissioner whether he had ever received money from defendant. (Tr. 1428.)

We cannot say in light of the foregoing that defendant was improperly limited in his attempt to prove that Fulle did not attempt to influence votes of the other Commission members.

C. *Evidence concerning advertisements in defendant's newspaper and campaign contributions.*

Defendant asserts that he should not have been restricted from asking Stevens whether there was anything illegal about Origer's contribution to the Ogilvie campaign. A review of the transcript (Tr. 1327) reveals that defendant was properly barred from asking this question on direct because it was phrased in a leading manner.

Defendant also contends that he should have been allowed to introduce the testimony of Joseph Ferstl and Raymond Platt North which would have allegedly shown that defendant turned down advertising because of possible conflict of interest problems. Defendant relies on *United States* v. *Shavin,* 287 F.2d 647 (7th Cir. 1961), *cert. denied* 375 U.S. 944, and asserts that the trial court erred in not admitting this proof.

In *Shavin,* defendant attorney was charged with engaging in a continuing scheme between 1952 to 1956 to defraud insurance companies by submitting false medical bills. The trial judge did not permit defendant to introduce evidence of correct claims filed during the same time period with the same insurance companies. In reversing the judgment and remanding the case for a new trial, this court stated that the central question was the existence of a scheme with intent to defraud. The court ruled that evidence of similar transactions was admissible as rebutting Government evidence on fraudulent intent. The court further indicated that this was especially important since the existence of fraudulent intent was a close question.

The present case is distinguishable from *Shavin* in several respects. First, defendant is charged with requiring Origer to advertise in defendant's newspaper in return

for the rezoning of a 96 acre plot of land. There was no continuing scheme as in *Shavin* to require individuals to advertise in defendant's newspaper. In addition, the similar transactions in *Shavin* which were ruled to be admissible involved the same doctor submitting similar bills to the same insurance companies during the same period of time. In the case at bar, the transactions which defendant seeks to admit involve different individuals advertising in the same newspaper. Evidence of these transactions is not probative on the question of defendant's alleged extortion of Origer through misuse of his position on the County Board.

The trial court, therefore, did not err in refusing to admit this evidence.

D. *Limitation on evidence of Sellergren's gambling.*

Defendant complains that he was not given adequate latitude in questioning Sellergren on how much of the $90,000 payoff came from gambling winnings.

We have reviewed the transcript and find no merit in this contention.

E. *Origer's connection with Zizzo.*

Defendant complains that the trial court improperly prevented him from establishing that Origer and Zizzo had prior dealings in a land transaction in 1968.

We have reviewed the record and do not believe that the admission of evidence on this point was unduly limited.

III.

Bias of the Court

Defendant alleges that the trial judge should have removed himself from this case pursuant to 28 U.S.C. § 455. Defendant filed a pre-trial motion pursuant to § 455 requesting the judge to remove himself because of the trial court's ruling in an unrelated civil case in which defend-

ant's counsel represented a different individual as plaintiff. In dismissing some of the claims in the civil case but permitting an amended complaint to be filed, the trial court wrote:

> The history of this complaint makes it hard to determine whether the flaws in pleading are due to overzealousness, incompetence, frivolity or a design to harass.

Counsel for defendant contends that this language shows a personal bias against defendant.

Since the key phrase in the new statute, "a personal bias or prejudice," is taken verbatim from § 144, and there is nothing in the legislative history of the statute or the Code of Judicial Conduct, from which it comes, to indicate to the contrary, it must be expected that decisions construing § 144 will be thought controlling in interpreting this provision of § 455. 13 Wright, Miller, and Cooper, *Federal Practice and Procedure,* § 3542 (1975); *Davis* v. *Board of School Commissioners of Mobile County,* 517 F. 2d 1044 (5th Cir. 1975); *Parrish* v. *Board of Commissioners of Alabama State Bar,* 524 F.2d 98 (5th Cir. 1975); see 13 Wright, Miller, and Cooper, *Federal Practice and Procedure* § 3542 (1975).

A judge must recuse himself where facts sufficient to show judicial bias are alleged even though he may know them to be entirely false. The judge may not judge the verity of the facts presented but must examine their legal sufficiency. *United States* v. *Jeffers,* 532 F.2d 1101 (7th Cir. 1976); *United States* v. *Ming,* 466 F.2d 1000 (7th Cir. 1972), *cert. denied* 409 U.S. 915, *reh. denied* 409 U.S. 1051; "A trial judge has as much obligation not to recuse himself when there is no occasion for him to do so as there is for him to do so when the converse prevails." *Ming,* 466 F. 2d at 1004.

The basic facts alleged in defendant's motion relate to the trial court's comments in an unrelated civil case directed at counsel for defendant. At that time, counsel for defendant were representing different clients.

Defendant argues that the court's order expressed bias against defense counsel which resulted in prejudice to the defendant. The terms of § 455, however, expressly apply to personal bias or prejudice concerning a "party," not "counsel." "Party" as used in § 455 does not include counsel. *Davis* v. *Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975); *United States ex rel. Wilson* v. *Coughlin,* 472 F.2d 100 (7th Cir. 1973); *Giebe* v. *Pence,* 431 F.2d 942 (9th Cir. 1970). In addition, we can find no basis in the record for finding that the judge exhibited personal bias toward defendant either prior to or during the course of the trial. Nor can we say that defendant has shown a reasonable basis for questioning the judge's impartiality.

After careful consideration, all other matters raised in defendant's brief are deemed to be without merit.

For the foregoing reasons, defendant's conviction is hereby

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 19, 1976
Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 75-2126 vs.

FLOYD T. FULLE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 75 Cr 86.
BERNARD M. DECKER, Judge.

ORDER

On consideration of the petition for rehearing with suggestion that it be reheard in banc, and the supplement to appellant's petition for rehearing, filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same hereby is, Denied.

Supreme Court, U. S.
FILED
MAY 25 1977
MICHAEL RODAK, JR., CLERK

No. 76-992

In the Supreme Court of the United States

OCTOBER TERM, 1976

FLOYD T. FULLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 4

Conclusion 10

CITATIONS

Cases:

Brady v. *Maryland*, 373 U.S. 83 6

Goldberg v. *United States*, 425 U.S. 94 8

Jack v. *United States*, 409 F. 2d 522 5

Lorraine v. *United States*, 396 F. 2d 335 certiorari denied, 393 U.S. 933 5

Opper v. *United States*, 348 U.S. 84 9

United States v. *Addonizio*, 313 F. Supp. 486, affirmed, 451 F. 2d 49, certiorari denied, 405 U.S. 936 5

United States v. *Agurs*, 427 U.S. 97 ..... 6, 7-8

United States v. *Calandra*, 414 U.S. 338 5

United States v. *Eucker*, 532 F. 2d 249, certiorari denied, No. 76-5340, January 10, 1977 5

United States v. *Gardner*, 516 F. 2d 334, certiorari denied, 423 U.S. 861 5

Page

Cases—continued:

United States v. *Harris*, 543 F. 2d 1247 8

United States v. *Harrison*, 524 F. 2d 421 8

United States v. *Y. Hata & Co., Ltd.*, 535 F. 2d 508, certiorari denied, No. 75-1767, October 4, 1976 5

Statutes:

Jencks Act, 18 U.S.C. 3500 6

18 U.S.C. 3500(e)(1) and (2) 8
18 U.S.C. 1623 2
18 U.S.C. 1951 2
26 U.S.C. 7206 2

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-992

FLOYD T. FULLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 544 F. 2d 519.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1976. A petition for rehearing was denied on November 19, 1976 (Pet. App. B). On December 9, 1976, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to January 18, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied any constitutional or statutory rights by the government's routine destruction

of its agents' rough interview notes after the notes had been incorporated into a report summary, by its failure to produce those notes before the grand jury, or by its failure to disclose certain statements of its witnesses until the trial had commenced.

2. Whether the district court abused its discretion in denying petitioner's motion for a severance.

3. Whether the district court erred in denying petitioner's recusal motion.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of extortion, in violation of 18 U.S.C. 1951, three counts of making false declarations to a grand jury, in violation of 18 U.S.C. 1623, and two counts of filing false income tax returns, in violation of 26 U.S.C. 7206. He was sentenced to concurrent five-year terms of imprisonment on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, a County Commissioner of Cook County, Illinois, extorted substantial sums of money from various land developers in return for favorable action on rezoning applications. In order to conceal receipt of the extorted sums, petitioner filed false federal income tax returns for the years 1968 and 1970. In addition, while appearing before a federal grand jury in the summer of 1974, petitioner falsely denied that he had extorted money and falsely testified about the price that he had paid for a house in Florida that was bought with the proceeds of the illegal payments.

Specifically, the proof showed that Thomas Origer was the president of Origer Builders, Inc., a company that

bought, developed and sold large plots of real estate within Cook County (Tr. 430-432). In December 1968, Origer applied for a zoning change of a 96-acre tract of land from single-family to general residence so that his company could construct a unit development. Although the request was approved by the Zoning Board of Appeals, it was deferred by petitioner (Tr. 354, 357). Petitioner then met with Origer and demanded $10,000 in return for his assistance in obtaining the zoning change (Tr. 507-508). After Origer paid petitioner the money (Tr. 508), the rezoning application was approved (Tr. 516).[1]

From 1960 to 1972, Sellergren, Inc., was engaged in real estate development and management (Tr. 929-930). During that time the company purchased a 66-acre plot of land in Cook County for the purpose of constructing several 450 unit apartment buildings on the property (Tr. 933-935). In order to obtain zoning approval for the project, the company elicited the assistance of William Adams, a general contractor, and promised Adams that he would be given the opportunity to obtain the plumbing, heating, sprinkler and air conditioning contracts for the development if he could secure the necessary zoning authorization (Tr. 833, 1037). After petitioner deferred the proposal on several occasions (Tr. 368-375), he agreed to accept $20,000 in return for his cooperation. In June 1970, Adams paid petitioner the money (Tr. 861-865) and the zoning change was granted (Tr. 866).

---

[1]Petitioner also extorted payments from Origer in 1966, 1967, and 1968 in return for similar favorable treatment on rezoning applications (Tr. 446-449, 458, 469-470, 477-478, 489-8).

In July 1970, petitioner purchased a house in Hollywood, Florida, for $45,000, making a $20,000 down payment (Tr. 1099-1101, 1229). At petitioner's request, however, the contract and other pertinent papers were drafted to reflect a $35,000 purchase price and a $10,000 down payment (Tr. 1100). In 1974, petitioner testified before the grand jury that he had purchased the home for $35,000 and had paid $10,000 in cash as a down payment (Tr. 1163-1164). Petitioner also denied that he had ever received payments from Origer or Adams (Tr. 794, 796, 496, 798-801, 1156). In addition, he failed to report those payments on his 1968 and 1970 federal tax returns (Tr. 1240-1243, 1268-1272).

ARGUMENT

1. Petitioner contends (Pet. 29-34) that the government abused the grand jury process by destroying certain interview notes and by presenting to the grand jury a "laundered" summary of those interviews, which contained statements favorable only to the government.[2] Furthermore, petitioner claims that the government withheld exculpatory evidence by failing to supply him with certain witness statements prior to trial. The court of appeals correctly rejected these contentions.

a. Contrary to petitioner's assertion, the government did not deceive the grand jury in an attempt to obtain an

[2]Prior to trial, government witnesses Origer, Adams and Zizzo were interviewed by agents of the Federal Bureau of Investigation and the Internal Revenue Service and by various Assistant United States Attorneys. Pursuant to routine procedures, the notes taken during the course of those interviews were incorporated into a summary statement and were then destroyed. The summaries were presented to the grand jury and were given to petitioner. In addition, petitioner was provided with statements of Origer that had not been incorporated into the interview summary (Tr. 486-487).

indictment. This claim apparently relates to the fact that Origer, Adams, and Joseph Zizzo (from whom petitioner had purchased his Florida home) had stated in their initial interviews with the government that their transactions with petitioner had been legitimate; only later did they admit their complicity with petitioner in his illegal activities. Although the government did not inform the grand jury of the witnesses' earlier, exculpatory denials, a grand jury proceeding is not an adversary hearing to determine guilt or innocence. "Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States* v. *Calandra*, 414 U.S. 338, 343-344. Therefore, a defendant has no right to present evidence to rebut the prosecutor's presentation (*United States* v. *Y. Hata & Co., Ltd.*, 535 F. 2d 508, 512 (C.A. 9), certiorari denied, No. 75-1767, October 4, 1976), and the government is not obliged to present all available witnesses (*United States* v. *Eucker*, 532 F. 2d 249, 256 (C.A. 2), certiorari denied, No. 76-5340, January 10, 1977) or to produce evidence that undermines the credibility of its witnessess (*United States* v. *Gardner*, 516 F. 2d 334, 338-339 (C.A. 7), certiorari denied, 423 U.S. 861).[3] Especially since it had strong reason to doubt the veracity of the initial exculpatory statements made by Origer, Adams and Zizzo, the government proper-

[3]See also *Loraine* v. *United States*, 396 F. 2d 335, 339 (C.A. 9), certiorari denied, 393 U.S. 933; *Jack* v. *United States*, 409 F. 2d 522, 524 (C.A. 9); *United States* v. *Addonizio*, 313 F. Supp. 486, 495 (D.N.J.), affirmed, 451 F. 2d 49 (C.A. 3), certiorari denied, 405 U.S. 936.

ly determined not to present that evidence to the grand jury.[4]

b. Nor did the government withhold exculpatory evidence from petitioner. At trial, petitioner claimed that certain prior inconsistent statements of government witness were evidence favorable to the defense and should have been turned over to him prior to trial (see, *e.g.*, Tr. 418-422, 481-487). The government responded by contending that *Brady* v. *Maryland*, 373 U.S. 83, was inapplicable and that the material was producible only pursuant to the Jencks Act, 18 U.S.C. 3500, with which it had complied.

Whether or not the prior inconsistent statements constituted *Brady* material, petitioner had no right to production of the statements before trial.[5] As the Court recently noted in *United States* v. *Agurs*, 427 U.S. 97, 103, the rule announced in *Brady* applies only to "the discovery, *after trial*, of information which had been known

---

[4]While it is true that, after the grand jury had returned the indictment against petitioner, Adams disclosed to the government that he had been mistaken in certain testimony he had given before the grand jury, the government immediately moved to strike those portions of the indictment that had been based upon the erroneous information, and the indictment was amended (Tr. 823, 905, 922-923). Petitioner's claim (Pet. 32) that the indictment was based on perjured testimony is therefore groundless.

[5]In fact, the record plainly rebuts any contention that the government purposely attempted to conceal *Brady* material. The government submitted certain materials to the trial court for its *in camera* inspection, as suggested by the Court in *United States* v. *Agurs*, *supra*, 427 U.S. at 106. That material included statements of Origer, Adams and Zizzo and the 1969-1971 federal income tax returns of Zizzo.

to the prosecution but unknown to the defense" (emphasis added). See also *id.* at 112, n. 20. Here, all relevant statements were turned over to petitioner at trial, and he was able to use those statements to cross-examine Origer (Tr. 544-745), Adams (Tr. 875-921) and Zizzo (Tr. 1111-1134, 1139-1151) extensively on their meetings with the government, their payments to petitioner, and the accuracy of the government's summary of their statements (Tr. 545-546, 909-910).

For example, petitioner questioned Origer about his allegedly exculpatory prior statement that no one had solicited a certain payment from him (Tr. 557-558), his federal income tax liability problems with the government (Tr. 577-588), and his various payments to petitioner. Petitioner also interrogated Adams about his numerous meetings with the United States Attorney's Office (Tr. 906-907) and his testimony before the grand jury (Tr. 866, 894-895, 899-900, 903, 905, 918-920), including his statement about a $10,000 payment to petitioner on January 30, 1971, and he was able to bring out that Adams later informed the government that he had been mistaken about the January 1971 payment and that, as a result, the indictment had been amended (Tr. 905-906). Similarly, petitioner asked Zizzo about his initial representation to the government that petitioner had purchased his home in Florida for $35,000 instead of the actual purchase price of $45,000 (Tr. 1115-1116).

In sum, the disclosure of the witnesses' prior statements during rather than before trial, in accordance with normal procedures and the mandate of the Jencks Act, did not adversely affect petitioner's ability to cross-examine those witnesses or to present his defense. Indeed, petitioner has never demonstrated that he could have "create[d] a reasonable doubt that did not otherwise exist" (*United States*

v. *Agurs, supra,* 427 U.S. at 112) if he had been provided the material prior to trial.

c. Although, as petitioner notes, the courts of appeals have taken divergent views as to the producibility of rough interview notes of government agents (compare *United States* v. *Harris,* 543 F. 2d 1247 (C.A. 9), and *United States* v. *Harrison,* 524 F. 2d 421 (C.A. D.C.), with the cases cited in *Harrison* at 524 F. 2d 421, 430, n. 25), this is not an appropriate case in which to resolve the issue.[6] Origer and Adams expressly attested to the accuracy of the government's summary of their interviews, and petitioner (who was given the summaries) has not suggested any plausible reason to believe that he was prejudiced by the destruction of the rough notes. The evidence clearly showed that petitioner demanded and received numerous illegal payments from certain land developers, that he denied receiving those payments before the grand jury, and that he failed to report those payments as taxable income on his federal income tax returns. Furthermore, he received and used extensive Jencks Act material in cross-examining the government's witnesses. In these circumstances, "no substantial rights of [petitioner] have been affected by the destruction of the rough notes * * * ." *United States* v. *Harris, supra,* 543 F. 2d at 1253.

---

[6]We are unaware of any case in which the good faith destruction of rough interview notes in accordance with standard agency practice has led to the reversal of a conviction. In our view, interview notes are not producible under the Jencks Act unless they are "signed or otherwise adopted or approved" by the witness or are a substantially verbatim report of the interview. See 18 U.S.C. 3500(e)(1) and (2); *Goldberg* v. *United States,* 425 U.S. 94, 110-111, n. 19. In any event, this issue is of little continuing importance because the F.B.I. and the I.R.S. have recently changed their internal procedures to require retention of the rough interview notes of their agents.

2. Petitioner's remaining claims (Pet. 18-28, 34-35)—that the district court erred in denying a severance and in refusing to recuse itself—are fully answered by the court of appeals, upon whose opinion we rely. As that court found (Pet. App. 5a), petitioner did not show that he had been prejudiced by joinder of the related offenses, since he "failed to demonstrate that the evidence and issues are so complicated that the jury could not keep separate evidence relating to each count." The court noted that "the only inherent complexity in the case arose from the introduction of banking documents and County Board records. This evidence was merely corroboration of the testimony of key witnesses" (*ibid.*), that the jury was assisted in considering the evidence on each count separately by the trial court's instructions and defense counsel's closing argument (*id.* at 6a), and that the evidence relevant to the Origer counts would have been admissible at a separate trial of the Sellergren counts and vice versa (*id.* at 7a). Therefore, the district court did not abuse its discretion in denying a severance. See *Opper* v. *United States,* 348 U.S. 84, 95.

Similarly, the court of appeals correctly rejected petitioner's allegations of judicial bias. As the court below remarked (Pet. App. 13a), "we can find no basis in the record for finding that the judge exhibited personal bias toward defendant either prior to or during the course of the trial. Nor can we say that defendant has shown a reasonable basis for questioning the judge's impartiality."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL J. KEANE,
Attorneys.

MAY 1977.

DOJ-1977-05